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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Door County and Washington
Island Ferry Line, Inc. for Permits to Place a
Structure on the Bed of and Removal of Material
from the Bed of Lake Michigan, Town of Liberty
Grove, Door County, Wisconsin

Case No.: 3-NE-97-423 and 3-NE-97-424

Investigation on Motion of the Department of
Natural Resources of an Alleged Unlawful
Maintenance of a Structure on the Bed of Lake
Michigan, Town of Liberty Grove, Door County,
Wisconsin by Washington Island Ferry Line, Inc.,
and Door County

Case No. 3-NE-98-0478LL

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on September 29-30 and October 28, 1998, at Sturgeon Bay, Wisconsin, Jeffrey D. Boldt, administrative law judge (ALJ) presiding. The parties requested an opportunity to submit written closing arguments, and the last submittal was received on November 23, 1998.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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Washington Island Ferry Line, Inc.

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Door County, by

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In Case No. 3-NE-97-423, Door County, c/o Mr. Grant P. Thomas, Corporation Counsel, P. O. Box 670, 421 Nebraska Street, Sturgeon Bay, Wisconsin 54235-0670; and Washington Island Ferry Line, Inc., c/o Randall J. Nesbitt, Pinkert, Smith, Weir, et al., P. O. Box 89, 454 Kentucky Street, Sturgeon Bay, Wisconsin 54235, applied to the Department of Natural Resources for a permit to dredge and place a structure/deposit on the bed of Lake Michigan. The proposal is to construct a rubble mound breakwall, 200 feet long by 40 feet wide at the bottom and 10 feet wide at the top on the bed of Lake Michigan. The project is located in the SW ¼ of the SE ¼ of Section 33, Township 33 North, Range 29 East, Town of Liberty Grove, Door County, Wisconsin.

On March 3, 1998, the Department of Natural Resources approved the application with permit conditions.

On March 20, 1998, the Department received a request for a contested case hearing pursuant to sec. 227.42, Stats., from Door County; and on April 2, 1998, a request was received for a contested case hearing from Washington Island Ferry Line, Inc.

The co-applicants objected to the following two permit conditions proposed by the DNR:

Condition No. 9 "Plans must be submitted which show how the Breakwall will be surfaced to allow access for fishermen and the public. The breakwall will be open to the public and access provided."

Condition No. 10 "The ferry docks must be open to the public for fishing during hours the ferries are not in operation."

In case No. 3-NE-98-0478LL, the Department of Natural Resources (The Department) Northeast Region staff conducted field investigations and alleged that Washington Island Ferry

Line, Inc., and Door County are maintaining a solid pier structure known as the Washington Island Ferry Dock on the bed of Lake Michigan at Northport Harbor in Government Lot 1, Section 33, Township 33 North, Range 29 East, Town of Liberty Grove, Door County, Wisconsin, in violation of secs. 30.12 and 30.15, Stats. Although the structure was issued permits (2-WP-1288, 3-WR-744) in 1958 and 1970, it is alleged that the structure as maintained, and in its present configuration, infringes upon the rights and interest of the public in Lake Michigan in that fishing or swimming from the pier are prohibited by one or both of the Respondents.

The Department further alleges that the maintenance of this structure in Lake Michigan in violation of secs. 30.12 and 30.15, Stats., is declared to be a public nuisance by sec. 30.294, Stats.

The DNR alleged that said actions by the above-named Respondents constitute a violation of secs. 30.12, 30.15 and 30.294, Stats.

Case 3-NE-97-424, relating to the dredging, was REMANDED to the DNR by agreement of the parties on the record on September 29, 1998.

The parties requested an opportunity to submit written closing arguments, and the last was received on November 23, 1998.

FINDINGS OF FACT

1. Door County and Washington Island Ferry Line, Inc. (WIFL), P. O. Box 39, Washington Island, Wisconsin 54246, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place a structure on the bed of Lake Michigan, Town of Liberty Grove, Door County. The Department and the co-applicants have fulfilled all procedural requirements of secs. 30.12 and 30.03, Stats.

2. WIFL owns real property located in the Town of Liberty Grove, at Government Lot 1, Section 33, Township 33 North, Range 29 East, Door County. The above-described property abuts Lake Michigan which is navigable in-fact at the project site.

3. The co-applicants propose to construct a rubble mound breakwall "groin" to the east of the existing Northport Harbor ferry dock. The breakwall will be an extension shoreward of an existing breakwall. The breakwall is needed to prevent the harbor from accumulating sediments which requires dredging every two years. The proposed breakwall would be 300 feet long and 40 feet wide at its base, tapering to 10 feet wide at the top.

4. The purpose of the rubble mound breakwater is to intercept littoral drift and thus reduce or eliminate shoaling within the harbor. Since construction of the existing stone breakwater in 1992, there has been an accumulation of sediment in the harbor, which has required substantial dredging. The cost of dredging has been borne by WIFL. The cost of breakwater construction would be largely funded by the public in the form of a Harbor

Assistance Program (HAP) grant provided by the State of Wisconsin Department of Transportation (DOT). Under the terms of the HAP grant, State taxpayers would provide 80% of funds and WIFL would contribute 20%. The original breakwater was also constructed under the same terms with HAP funds.

5. In August of 1997, Door County enacted an ordinance to prohibit fishing and swimming from the Northport Dock. (Ex. 48) The Resolution authorizing the ordinance made the following determinations:

WHEREAS, The Northport Ferry Dock, harbor improvements and ferry provides necessary water access for passengers, and commodities between Washington Island and the County of Door mainland and thereby confers a significant benefit or advantage of the public; and

WHEREAS, WIFL Inc. has represented that the activities of fishing or swimming off of Northport Ferry Dock or harbor improvements related to Northport would interfere with use of the dock as a "commercial transportation facility" and their interest as lessee; and

WHEREAS, The activities of fishing or swimming off of Northport Ferry Dock or harbor improvements related to Northport and use of the dock as a "commercial transportation facility" are incapable of existing or being exercised together; and

WHEREAS, The activities of fishing or swimming off of Northport Ferry Dock or harbor improvements related to Northport and the use of the dock as a "commercial transportation facility" poses a significant risk of injury and danger to the public; and

WHEREAS, Northport Ferry Dock, by virtue of its use as a "commercial transportation facility", is distinguishable from other publicly owned docks in the County of Door; and

WHEREAS, enactment of an ordinance is necessary to establish a mechanism whereby this "no fishing or swimming" policy of Northport Dock may be enforced. (Id.)

The Ordinance enacted went further, restricting fishing at "... the Northport Ferry Dock and all harbor improvements including the breakwall(s) and proposed rubble groin related to Northport located in Door County, Wisconsin. (Ex. 61)

6. The Northport Dock (the Dock) received its first permit in 1958. (Ex. 23) It authorized a 300 ft. x 42 ft. structure. In 1970, an additional permit was granted to construct loading ramps, protective walls, as well as a permit to operate and maintain the pier as it existed in 1970. (Ex. 23) The Dock at that time was 300 ft. to 400 ft. long. In 1981, a third permit was granted to extend the Dock to 470 feet, its current length. (Ex. 27) At that time the Dock was

400 feet in length and authorization was given to add fifty (50) feet plus a "T" measuring twenty (20) feet. The final permit was issued in 1985 to construct an additional ramp. (Ex. 24)

None of the permits issued by the DNR have ever specifically required that the Dock be open to the public for fishing. There is no question that the Dock was used by the public for fishing, primarily bass, for many years. The Dock site was used for this purpose for approximately fifty years. The pier was a well-known and exceptional location for the public to fish smallmouth bass. This longstanding local tradition abruptly came to an end in 1994, as construction of the existing breakwater begun. The parties agree that the ban on fishing during this period was needed to protect the public from heavy construction equipment and related dangers. After the breakwater construction was complete, the ban on public fishing remained in force. The parties dispute whether said ban is necessary to protect the public.

7. From the record at hearing, the total prohibition of fishing from the Northport Dock is not necessary to protect the public safety. There is no question that the Dock area becomes congested during the summer months, particularly during regularly scheduled ferry line operation from 6:30 a.m. to 9:00 p.m. (Ex. 1) WIFL presented numerous witnesses who testified of minor conflicts between ferry line operations and people fishing off the pier. Most persuasive were the ferry boat operators, including Captain Dewey, who had witnessed people fishing from the tires that provide a buffer to approaching ferry boats. (See: Ex. 6)

While there were minor conflicts during the period in which fishing was allowed at all times, there were no serious accidents between the fishing public and WIFL boats over the entire 50 year period. The DNR Area Water Management Specialist, Ms. Duperrault, opined that there was sufficient congestion at the site that it would be prudent to preclude fishing off the Northport Dock during the regular hours of operation of WIFL boats.

WIFL and the County attempted to demonstrate that there would remain a significant public safety risk if fishing were allowed only during the hours that the ferry was not in regular operation. WIFL undertakes many unscheduled trips, over 600 during the period of January 1, 1998 to September 1, 1998. (Ex. 34) However, the risk of any serious conflicts between public fishing from the pier and ferry operation are remote and manageable if limited to the hours before and after regularly-scheduled ferry operation. First, the pier as a whole would be less congested with sight-seers and others during these hours. Secondly, fishing could very easily be restricted to an area of the pier that does not have a direct impact on ferry arrivals or departures. Third, if the ferry is operating due to emergency conditions, people fishing would likely be respectful of the need to allow ferry ingress and egress. Finally, there has been no serious safety conflict between anglers and ferry operations over a fifty year period, even though both activities were undertaken during the hours that the pier was most congested. It simply stretches credibility to believe that, under less congested conditions, there is any reasonable risk of a safety problem if fishing is conducted before and after the regular hours of ferry operation. Accordingly, the terms of the proposed condition are reasonable if the DNR has authority to attach the Dock permit to the new breakwater permit application.

8. While the absolute ban on public fishing from the pier is not supported by the record at hearing, the Department does not have authority to impose a new condition of the

Northport Docks, other than in connection with the sec. 30.03, Stats., enforcement action. The DNR Lakeshore Team Supervisor, Ronald Fassbender, testified that in nearly 30 years of water regulation work for the DNR, he had never before imposed a new condition on an existing, permitted facility in connection with the processing of another Chapter 30 permit application. This is for good reason. Permit applicants have a right to rely on the finality of the permitting process. If later conditions warrant a re-opening of the original permit, the DNR should undertake to do so and not tack on such a request to conditions on a new permit application. The DNR has not sought to re-open the Northport Dock permit. Instead, it seeks to impose the public fishing access condition for the dock in connection with the breakwater application. The DNR, and the Division, lack legal authority to do so in connection with the permitting of the proposed breakwater extension. The Department does not have authority to impose a new condition on the previously-permitted dock in the absence of an action to re-open the permit, or the sec. 30.03, Stats., enforcement action. The DNR has not sought to re-open the Northport Dock permit. Accordingly, the only jurisdictional basis remaining to require access to public fishing at the Dock is the enforcement proceeding.

9. The DNR has not carried its burden with respect to the enforcement proceeding. Section 30.03, Stats., has two prongs. The DNR must show: 1). that there is a violation of Chapter 30 or a violation of the public rights relating to navigable waters; 2). that the public interest may not be served by imposition of a forfeiture or penalty. The record at hearing demonstrated that the Department had carried its burden of proof with respect to the second prong, but not the first. First, the DNR has shown that a forfeiture or other penalty would not restore public fishing rights at the pier and thus would not protect the public interest. (Fassbender) However, the Department has not shown that the Northport ferry dock is "detrimental to the public interest." The Northport ferry dock is the principal departure point for the Washington Island Ferry, which serves visitors to and residents of Washington Island on a year-round basis. Ron Fassbender testified that, even with the ban on public fishing, the pier remains in the public interest. Because WIFL has a permit, the dock is not placed in "violation of the statutes relating to navigable waters." The permits previously issued to WIFL did not require public access for fishing. The only remaining issue then is whether the Dock "violates public rights in navigable waters." Because placement of the previously-permitted pier, even in the absence of access to anglers, is not detrimental to the public interest in navigable waters, there is no such violation. Accordingly, the permit condition relating to fishing from the Dock must be stricken.

10. There is no conflict between keeping the breakwater open to public fishing and the Harbor Assistance Program (HAP) grant received by WIFL. There is no question that the HAP grant serves a "commercial transportation facility" within the meaning of sec. TRANS 28.02, Wis. Admin. Code. WIFL "transports passengers and commodities" and its facilities are not "used on a regular basis by recreational or sport fishing vessels." The code does not reference fishing that is not conducted from a boat or other "recreational or sport fishing vessel." Nothing in the Transportation Code or the HAP Grant Agreement (Ex. 45) prohibits or restricts the public from accessing such facilities from the shore or foot or wheelchair for fishing. Accordingly, the HAP agreement does not prohibit access to the breakwater for public fishing.

11. There would be a detrimental impact to the public waters in the construction of yet another large structure on the bed of Lake Michigan by WIFL. Both Mr. Fassbender and Ms. Duperrault testified that a substantial area of the lake would no longer be available for public purposes as a result of construction of the breakwater groin. The DNR presented testimony that the total footprint of all WIFL and County structures in the area totaled 11.46 acres, and the structures themselves occupied 4.33 acres of public waters. (Ex. 75) The proposed south breakwater groin will occupy some 14,250 square feet, or .32 acres, of public waters. (Id.) Balancing this detriment of the loss of public waters with the financial benefit to WIFL of a reduction in its dredging costs, the Department properly conditioned issuance of a structure permit on a requirement that the breakwater be made available to the public for fishing. The public has long fished the area around the Northport Dock for bass. The loss of another large area of public waters that can not be fished would detrimentally impact public rights in the public waters of the state. The need for public access to fish off the breakwater is particularly important given the loss of the best onshore smallmouth bass fishing site in Door County, the end of the Northport Dock. However, the Department does not have authority to require that the applicant incur significant financial cost to create a public benefit. It is hoped that public funding can be found to assist the applicant in improving the breakwater facility to make it open for public fishing. In the absence of public funding, it is hoped that the applicants could voluntarily contribute to improvement of the breakwater.

12. The proposed breakwater expansion structure will not materially obstruct existing navigation on Lake Michigan and will not be detrimental to the public interest upon compliance with the conditions of this permit.

13. The co-applicants are financially capable of constructing, maintaining, monitoring or removing the breakwater structure if it should be found in the public interest to do so.

14. The parties stipulated that the proposed breakwater structure would not reduce the effective flood flow capacity of Lake Michigan upon compliance with the conditions in the permit.

15. The proposed breakwater structure will not adversely affect water quality nor will it increase water pollution in Lake Michigan. The structure will not cause environmental pollution as defined in sec. 281.01(10), Stats., if the structure is built and maintained in accordance with this permit.

16. There is some conflict between requiring that the County and WIFL make application for funding to improve a portion of the breakwater sufficiently to allow public access for fishing and the prospective County Ordinance that seeks to prohibit such fishing on the as yet unbuilt breakwater structure. The Division does not have authority to declare the County Ordinance as being an unconstitutional limitation of the public trust doctrine, or to otherwise render it void. The statutory authority of the DNR, and by extension the Division, is to determine if the structures permit meets the standards under sec. 30.12(2), Stats. A clear preponderance of the evidence indicates that the permit co-applicants have not carried their burden of demonstrating that the breakwater would be "not detrimental to the public interest" in the absence of a condition allowing public access for anglers.

A preponderance of the evidence demonstrated that the ferry line would continue to operate without the breakwater extension, but would incur greater costs for dredging. Public rights in public waters would be detrimentally impacted unless the loss of public waters is balanced against public access for fishing from the structure. It is up to WIFL to conclude if it is in its interest to voluntarily contribute financially to an improvement of the breakwater structure. It is up to the County to conclude if an amendment of its Ordinance is in order, or if it is in the interest of the County that the structures permit not be issued. However, the statutory standards for issuing the sec. 30.12, Stats., structures permit will not be met if the detrimental impact of the loss of public waters is not balanced against public access for fishing from the breakwater. Both Fassbender and Duperrault testified that this loss of public waters was a significant loss of public access to the public waters of the State.

17. The co-applicants also argue that a permit condition requiring public access to the breakwater for fishing should not be imposed because it would necessarily involve the public crossing private property to obtain such access. However, the record at hearing indicates that the public could obtain such access by other means, principally by walking along the shore below the ordinary high-water mark (OHWM). Accordingly, it is not necessary to decide if the DNR has authority to require public access across private property. Given WIFL's longstanding record of allowing unlimited access to the Dock and its other facilities to sightseers and anglers, it is hoped that the co-applicant will not seek to enforce trespass laws against anglers crossing their property to gain access to the breakwater groin. Certainly, any theoretical trespasser so charged has an argument that the public does have a limited authority to cross private property, as the State Court of Appeals held in *State v. Town of Linn*, 205 Wis. 2d 426, 556 N.W.2d 394 (Wis. Ct. App. 1996). In that case, it was determined that "...it is appropriate to extend the public trust doctrine to include navigable waters and the shore appurtenant in order to ensure the public's continued access and free use the waters." *Id.*, at p. 443.

18. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

Any determination of the public interest in navigable waters necessarily involves a "balancing" of the rights of riparian owners and the public rights in waters held in the public trust. *Godfrey Co. v. Lopardo*, 164 Wis. 2d 352, 374, 474 N.W.2d 786 (Wis. Ct. App. 1991). With respect to the Northport Dock, the balance strongly supports keeping the dock open whether the public has access to the dock for fishing or not. (Fassbender) The Northport Dock is vital to the operation of the ferry line, which benefits the public interest in navigable waters by providing a vital transportation and cargo-hauling link to residents and visitors to Washington Island. Further, there was testimony that there were safety conflicts between anglers and ferry boats, at least during the regular hours of operation of ferry service. Further, the ban was not a violation of the previously issued structures permit. Taken as a whole a clear preponderance of the credible evidence supports a finding that, even with the ban on public fishing, that Northport

Dock is "not detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats.

The balancing of the public interest is strikingly different as it relates to the rubble mound breakwater groin. First, there is no previously-issued permit relating to the rubble mound groin. The applicant has not relied on the terms and conditions of such a permit, and the proper balancing of public and private rights will be expressed in the terms and conditions of such a permit. Second, there was a paucity of testimony that there would be serious safety hazards associated with providing an improved area for public fishing off the breakwater. Third, the rubble mound breakwater provides no significant benefit to the public interest in navigable waters. The most significant benefit of the construction of the breakwater groin will be that WILF will be saved the expense of dredging which it now undertakes every two years. (Richter) There was no testimony in the record that there would be any other significant impact on the public waters as a result of the construction of the breakwater groin. The public will have lost access to a prime bass fishing site, in and around the proposed groin expansion.

However, the DNR does not have legal authority to require that WIFL and the County provide a public benefit in connection with issuance of the structures permit. The parties essentially agree that the Department's authority to impose conditions on WIFL and the County are broadly circumscribed by "takings" laws. The "takings" analogy is not a perfect fit for the instant matter, which involves a discretionary issuance of a permit to place a structure on public trust waters. In this matter, there is thus no private land at stake that is subject to regulation by the government—rather it is a private riparian that seeks to meet the statutory standards to place a structure that benefits only the private riparian on waters held in trust for the public. Nonetheless, the "takings" case law is illustrative of the broad principle that the government can not require a private party to provide a "public benefit," but may require actions to prevent a public harm. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

The exact facts of this situation appear to be a case of first impression, guided by common law principles and constitutional "takings" considerations. The Department argues that in seeking an improved public access fishing area on the rubble mound groin, it will be acting to prevent the public harm resulting from a new structure chipping away at public waters for the sole benefit of a private riparian. WIFL argues that the DNR would instead be seeking for WIFL to incur the costs of the improved fishing area, thus conferring a "public benefit" rather than preventing a public harm. These concerns are balanced in this decision by the permit condition requiring that WIFL not prevent public fishing from the breakwater, so long as funding is secured to pay for the improved fishing area. However, the balancing of public and private rights indicates that the permit should not be issued if some limited public access for fishing is not provided

All parties would have been better served if this case had been settled. Instead, the rhetoric on both sides reached absurd levels. Some members of the public were led to believe that the DNR was seeking to shut down the venerable and distinguished Washington Island Ferry, when it was only seeking to preserve the public's right to fish public waters. Likewise, the Department's attempt to gain jurisdiction over the Northport Dock by means of an enforcement action declaring the dock a "public nuisance" was misguided. It is hoped that the

parties will find a way to resolve conflicts remaining after this decision without extensive further litigation. This is a case that cries out for the kind of cooperation and good will that long characterized the delicate balance between the public interest in navigable waters and the needs of a private commercial carrier with a long history of serving the public.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The co-applicant, WIFL is a riparian owner within the meaning of sec. 30.12, Stats.

3. The proposed facilities, including the proposed breakwater groin and the existing Dock described in the Findings of Fact, constitute structures within the meaning of sec. 30.12, Stats.

4. The proposed breakwater project would "not be detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats., so long as the breakwater is made open to the public for fishing.

5. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. *Muench v. PSC*, 261 Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation and scenic beauty. *WED, Inc., v. DNR*, 85 Wis.2d 518, 526, 271 N.W.2d 69 (1978). The proposed breakwater project would be detrimental to the public interest in public waters in the absence of a condition requiring access to the public for fishing. The detriment would be the loss of public waters for private benefit. This detriment will be properly balanced against providing an improved public access area for fishing from the breakwater groin. The balancing of public and private rights is reflected in the conditions of the permit set forth below.

6. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats., on the ground that they impair natural beauty. This is a proper basis for denial of a permit. *Claflin v. DNR*, 58 Wis.2d 182, 206 N.W.2d 392 (1973). The proposed project would not be detrimental to the public interest in natural scenic beauty.

7. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., *Village of Menomonee Falls v. DNR*, 140 Wis.2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has carried its burden of showing that the proposed breakwater expansion project would be not detrimental to the public interest in navigable waters, so long as the project is undertaken according to the permit conditions set forth below.

8. The rights of a riparian must be balanced with the public rights in the navigable waters of the state. The reasoning with respect to the Dock and breakwater extension are set forth in the Findings and Discussion sections above.

9. The DNR must consider the "cumulative impact" of many small pier slip projects on a lake as a whole in carrying out its legislatively assigned duty in protecting the navigable waters of the state. *Sterlingworth Condominium Asso. V. DNR*, 205 Wis.2d 710, 721-722, 556 N.W.2d 791 (Wis. Ct. App. 1996). Accord: *Hixon v. PSC*, 32 Wis.2d 608, 631-32, 146 N.W.2d 577, 589 (1966). The loss of acres of public waters to structures requires a balancing with public rights.

10. If the department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the department may proceed as provided in sec. 30.03, Stats., either in lieu of or in addition to any other relief provided by law. The department may order a hearing under Ch. 227 concerning the possible violation or infringement, and may request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. Section 30.03(4)(a), Stats. The DNR has not demonstrated that the Northport Dock is placed in violation of Chapter 30, nor that its placement violates public rights in navigable waters. The Department has shown that public access to fishing would not be restored by imposition of a fine or other penalty.

11. Trans 28.02, Wis. Admin. Code, relating to HAP grants provides: "Commercial transportation facility" means a facility used by vessels under construction or repair, by vessels transporting passengers or commodities or by commercial fishing vessels, but does not include a facility used on a regular basis by recreational or sport fishing vessels. . . . "Eligible applicants" means a county, municipality, town or agency thereof or a board of harbor commissioners organized under s. 30.37, Stats. There would not be a conflict with the above-stated administrative code if the breakwater were made available to the public for fishing in public waters.

12. Trans 28.04, Wis. Admin. Code, provides: Every eligible harbor assistance project shall benefit a commercial transportation facility. Eligible harbor assistance projects include: dockwall and disposal facility construction, repair, maintenance or rehabilitation; maintenance dredging of materials from a harbor or dredging of new harbor areas; dredged material disposal; and other harbor improvements related to the physical needs of a port that maintain or increase commodity movement capabilities. There would not be a conflict with the above-stated administrative code relating to the HAP grant if the breakwater were made available to the public for fishing in public waters.

13. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the co-applicants, a permit under sec. 30.12, Stats., for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction of the structure.
4. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.
5. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. You must notify Water Management Specialist Tere Duperrault, Sturgeon Bay, WI (phone 920-746-2873) before starting construction and again not more than 5 days after the project is complete.
7. You must complete the project as described on or before March 3, 2000. You may not begin or continue construction after this date unless the Department grants a new permit or permit extension in writing.
8. This permit does not authorize any work other than what you specifically describe in your application and plans, and as modified by the conditions of this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.
9. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting your project.
10. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agree to follow all conditions of this permit.
11. Plans must be submitted to the Department which show how some portion of the breakwall will be surfaced to allow access for fishermen and the public. Some portion of the breakwall will be open to the public and access provided.

12. Erosion prevention/control must be used during and after construction until all disturbed areas are stabilized.

13. The rock used to construct the breakwall must be free of debris and fines.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on December 23, 1998.

STATE OF WISCONSIN
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By Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.